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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 259 (D)

In the Matter of

OTTO HENRY PARKENING,

Bankrupt.

OTTO HENRY PARKENING,

Petitioner,

vs.

JULES ARNOLD,

Petition for Writ of Certiorari to Review Decision of Circuit Court of Appeals, Ninth Circuit, on Important Question of Bankruptcy Law.

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TABLE OF AUTHORITIES CITED.

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To the Honorable Chief Justice, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

The petition of Otto Henry Parkening respectfully represents to the court as follows:

1. That prior to the 19th day of June, 1942, your petitioner was, and at all times since has been, a resident of the State of California, and that on that date he was, by an order of adjudication, adjudged to be a voluntary bankrupt by the United States District Court, Southern

District of California, Central Division. That, thereafter, and in due course and on the 12th day of August, 1942, your petitioner was discharged "from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in Bankruptcy." [Tr. p. 6.]

2. That among the debts scheduled by your petitioner in said bankruptcy was a judgment rendered on September 16, 1941, by the Superior Court of the State of California in the action entitled "Jules Arnold v. O. H. Parkening, Robert B. McElroy, S. G. Bateman, O. H. Parkening, Inc., a domestic corporation, *et al.*," which judgment was scheduled in the amount of $7,520.08 inclusive of interest and costs. [Tr. p. 5.]

3. That Jules Arnold, the judgment creditor, although he received due notice of said judgment scheduled in said bankruptcy, did not file his claim therein or otherwise appear in the matter of the bankruptcy and the character of the judgment debt was not, prior to the discharge of the bankrupt, presented, litigated or determined by the bankruptcy court and has never since been so determined by that court.

4. The action of *Arnold v. Parkening, et al.*, was commenced in the state court by Jules Arnold to determine his status as an equal partner of your petitioner in the business of buying and selling real and personal property on commission, and to his ownership of fifty per centum of the capital stock of O. H. Parkening, Inc., a corporation, which corporation was alleged to be the ultimate vehicle through which the business of the alleged partnership was to be conducted. In that action the plaintiff prayed for a judgment which by its terms shall adjudge

and declare plaintiff to be the equitable owner and entitled to one-half of the capital stock of the corporation, "and one-half of the shares of stock evidencing the authorized capital" thereof, and to all dividends, rights and emoluments in any manner accruing therefrom; that defendants be required to account to plaintiff for all rents, issues and profits received by them or either of them for or on account of the defendants O. H. Parkening, Inc., and that all such shares of stock, rents, issues and profits be adjudged to be held in trust by the defendants for the use and benefit of plaintiff; that a restraining order be issued and that a receiver be appointed, and for general relief. [Tr. p. 35.]

From the complaint it appears the plaintiff in that action and petitioner herein entered into an agreement to form a partnership for the purpose of engaging in the business of real estate broker, that is, to buy and sell real and personal property on commission, a business or profession which is, by the laws of the State of California, required to be licensed, or more properly, the individuals practicing or engaging in such profession or business must be licensed. By the provisions of such agreement it appears further that a corporation was to be formed to take over the business of the partnership and that Jules Arnold and your petitioner were to own the issued shares of stock in equal proportions.

The corporation was formed but no application was made to the Commissioner of Corporations of California for the issuance of stock and no shares were ever issued, nor did the corporation ever function as such.

Upon the trial of that action a judgment was entered against the defendants, one of whom is your petitioner, holding that Jules Arnold and petitioner were partners

and that the corporation was a part of the partnership [Tr. p. 60], and ordering a reference for the purpose of an accounting. Upon the return and hearing of the report of the referee a further judgment was made by which it is held a partnership existed between Jules Arnold and O. H. Parkening and finding the amount of money due Jules Arnold from petitioner which ostensibly establishes an equal division of the partnership profits for the period of its existence.

It was this judgment that was scheduled by petitioner in his bankruptcy proceedings.

5. Subsequent to the discharge of petitioner in bankruptcy Jules Arnold applied to the state court in the matter of the action of *Arnold v. Parkening*, for the issuance of a writ of execution, which writ was issued and under which certain funds came into the hands of the sheriff. Petitioner then applied to the state court for an order recalling and quashing said writ of execution, and, upon hearing, was denied such order. Petitioner thereupon applied to the United States District Court, in the matter of said bankruptcy, for an order restraining the sheriff from turning over to Jules Arnold any of the funds taken into the possession of the sheriff by reason of the writ of execution issued by the state court in the action of *Arnold v. Parkening*, which order of restraint was duly issued and made returnable before the Referee in Bankruptcy. Upon the hearing the Referee held that the petition of your petitioner herein for an examination of the nature and character of the scheduled debt by the District Court, sitting in bankruptcy, presented no unusual circumstances warranting a hearing and that a hearing would be a retial of the issues previously determined by the state court. [Tr. pp. 7-11.]

From the decision of the Referee petitioner was, on his application therefor, granted a review by the District Court, which court affirmed the decision of the Referee to the effect that a hearing on the merits would be a retrial of the finding of the state court made upon the motion to recall and quash the writ of execution. [Tr. p. 64.] From that decision petitioner went by appeal to the Circuit Court of Appeals for the Ninth Circuit. That court, by Denman, Stephens and Healy, on March 24, 1945, affirmed the judgment of the District Court without further opinion than to say, *per curiam*:

> "We see no reason why the character of the judgment as based on the fraud of appellant as determined by the Superior Court of the State of California, in and for the County of Los Angeles, shoud be relitigated in this bankruptcy proceeding." (148 F. (2d) 210.)

It is the decision and opinion of that court your petitioner asks be reviewed by your Honorable Court.

6. Your petitioner's appeal to the Circuit Court of Appeals presented two points, the first being that a state court has no power to construe an order, decree or judgment of a Bankruptcy Court or to act under any statute, law or regulation of the Federal Government relating to bankruptcy; and the second being that a state statute requiring a real property broker or salesman to be licensed as a prerequisite to his carrying on such profession or business renders all contracts void which relate to a division of the earnings of such licensed broker or salesman with an unlicensed person, and that the judgment in the action of *Arnold v. Parkening* rendered by the state court was and is void on its face for the reason that, as required by the statutes of California, there was no allega-

tion by the complaint in that action, no proof adduced at the trial and no finding, that Arnold was a licensed broker or salesman at any time during his relationship with your petitioner.

In discussing the points made to the Circuit Court your petitioner points out that the only expression of that court was to the effect that there appeared no reason why the Federal Court should relitigate the decision of the state court. Petitioner sought a rehearing by the Circuit Court, suggesting that the questions raised were of importance and that the reasons of that court for affirming the lower court might well satisfy petitioner and save the expense of this application for review. His petition was denied without comment.

To establish the jurisdiction of this court under Rule 38 of the Rules of the Supreme Court petitioner relies upon:

(1) Section 2 of the Bankruptcy Laws (Title 11 U. S. C. A. sec. 11).

(2) Section 17 of the Bankruptcy Laws (Title 11 U. S. C. A. sec. 35).

(3) Art. I, sec. 8, sub. 4; Article VI, sec. 1, and Amendment X, sec. 1 of the Constitution of the United States.

(4) Title 28 U. S. C. A. sec. 371 (Sec. 256, Judicial Code).

(5) Title 11 U. S. C. A. sec. 47(c).

The first point of petitioner is directed to the proposition that the several states of the Union surrendered to the Federal Government their right to enact bankruptcy laws or to legislate in relation to the bankruptcy of their citizens. If this premise is true (Art. I, sec. 8, sub. 4;

Art. VI, sec. 1, and Amend. X, sec. 1, U. S. Const.) then it follows that a state court acts in excess of its powers when it attempts to adjudge in bankruptcy matters. Likewise, the Congress may not enact statutes which have the effect of delegating any powers to the state courts in bankruptcy matters, nor have Federal courts power to decline to take jurisdiction in bankruptcy matters and acknowledge or abide by the decisions of state courts in such matters. The jurisdiction of federal courts in bankruptcy being exclusive and original (Title 28 U. S. C. A., sec. 371(6)) it follows that a refusal to take jurisdiction of bankruptcy proceedings or any of the matters thereof at the behest of a bankrupt petitioner is a *denial of justice*. The Federal Court is not bound by any constitutional provision nor by any rule of comity to take cognizance of a decision by a state court which in any manner pertains to a construction of the record in a bankruptcy proceeding properly inaugurated, and hence, a hearing in the Federal Court after action by a state court is in no sense a rehearing of the matters requested.

Section 17 of the Bankruptcy Act specifies those debts of a bankrupt which are not discharged by the Act. There is no provision by the Act as to the time, place or manner of determination of the character of any such debts as dischargeable or not. From the nature of the Act and the constitutional authorities under which it is promulgated, that is, the jurisdiction of the Federal courts being exclusive, it is only the Federal courts which can determine the nature and character of the debt as dischargeable or otherwise. Thus, a judgment creditor of a scheduled debt may not sit by and decline to present his claim with proof of its character and after discharge of the bankrupt charge in the state court that such debt was not discharged. The

evident purpose of the Act is to discharge the debtor of all his debts except those determined in the bankruptcy proceedings, and on the motion of the creditor to be not dischargeable under the provisions of Section 17. The insertion in the decree of discharge of a clause excepting therefrom such debts as are not dischargeable under the Act does not, if it has any effect at all, fulfill the purposes of the Act but leaves all of his scheduled debts open to future determination. It is apparent that the determination of the character of the debt must be in the bankruptcy proceedings and if not there so determined must be discharged, the burden being upon the creditor to advance his reasons as to why the debt fell within the exceptions of section 17 of the Act.

II.

The second of the propositions advanced by petitioner is that the judgment of the state court in the action of *Arnold v. Parkening* is void on its face and so being could not be considered for any purpose.

This proposition finds its support in pertinent provisions of the laws of the State of California, namely, those provisions which prohibit an unlicensed person from sharing in the earnings of a licensed real estate broker realized in the pursuit of his business. (Sec. 10137, Bus. and Prof. Code: "It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him." Sec. 10136, Bus. and Prof. Code: "No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any

action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.")

Even if the relationship of partners existed between petitioner and Arnold, or any other relation by which Arnold was to directly or indirectly share in the earnings of petitioner as a broker, that relationship must have been based upon a license in Arnold. (Sec. 10157, Bus. and Prof. Code: "No real estate license gives authority to do any act specified in this chapter to any person, other than the person to whom the license is issued," and Sec. 10158 of the same code: "When a real estate license is issued to a corporation, if it desires any of its officers other than its president, to act under its license as a real estate broker, it shall procure an additional license to so employ each of such officers. When a real estate license is granted to a partnership, if it desires any of its members other than the one or ones through whom it is already licensed to act as a real estate broker, it shall procure an additional license to so employ each of such additional members.") Manifestly it is impossible in a general partnership to conduct a real estate brokerage business with only one partner licensed. Under a form of limited partnership, permissible in California, the general partner might be licensed while none of the limited partners were, they having no control of or in the business and not participating in its management. But the partnership here involved, if it was so, was a general one.

An examination of the record discloses that Arnold did not allege himself to be a licensed real estate broker or salesman. [Tr. p. 27 *et seq.*] Neither is there any find-

ing that he was a licensed broker or salesman nor that any proof was offered on that point at all. The allegation of license and an affirmative finding thereof are necessary, in an action of this kind, to create a valid judgment. The lack of such allegation and such finding appearing on the face of the judgment roll the judgment is void and hence subject to attack anywhere at any time and in any proceeding.

But even if the judgment were not subject to attack here, still petitioner can raise the validity of the contract at any time. On this point see *Sola Electric Co. v. Jefferson Electric Co.* (1942), 317 U. S. 173, 87 L. Ed. 165, 63 Sup. Ct. 172. That such contracts are illegal has been held by the California courts on several occasions. (*Firpo v. Murphy* (1925), 72 Cal. App. 259, 236 P. 968; *Del Rey Reality Co. v. Pourl* (1941), 44 Cal. App. (2d) 399, 112 P. (2d) 649; *Davis v. Chipman* (1930), 210 Cal. 609, 293 P. 40; *Wise v. Radis* (1925), 74 Cal. 765, 242 P. 90.

That it is necessary to allege and prove, in an action for realty broker's commissions, that the plaintiff was licensed at the time the commission was earned, is held by *Hayter v. Fulmor* (1944), 66 A. C. A. 639, 152 P. (2d) 746, and that the requirement to license a realty broker falls within the police power of the state is held by *Gatti v. Highland Park Builders* (1945), 67 A. C. A. 872.

Petitioner avers that the points presented are of national interest in relation to matters within the purview of the bankruptcy laws, especially the first point as it bears upon the effect of discharge of bankrupts from debts whose character is undetermined prior to such discharge. Also it is of national interest and the even administration of justice that the jurisdiction of both state and Federal

courts in bankruptcy be determined and not left to the opinions of individual district judges as to whether they will or will not take jurisdiction as a matter of convenience.

It has been said that the relation between state and Federal courts rests upon comity. This may be true in those cases in which each has original jurisdiction, but cannot be so in those cases in which one or the other has exclusive jurisdiction under the Constitution, for comity can only apply among courts of equal power. For a Federal court to accept and abide by the judgment of a state court construing an order of the Federal court in bankruptcy is beyond the power of the Federal court and no question of comity can arise.

Wherefore, in consideration of the foregoing, your petitioner prays this Honorable Court issue its writ of certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

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